

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID FRED MINIER,

Defendant-Appellant.

---

UNPUBLISHED

April 27, 1999

No. 205282

Grand Traverse Circuit Court

LC No. 97-007238 FC

Before: Holbrook, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.778(2)(1)(a). The jury found that defendant had engaged in the anal penetration of his infant son. Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to a prison term of forty to sixty years. We affirm defendant's conviction and sentence, but remand for the sole purpose of allowing for the correction of a clerical error in the judgment of sentence.

On appeal, defendant first argues that the trial court erred in admitting into evidence the fact that defendant had previously been convicted of child cruelty. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

On the second day of trial, during defendant's cross-examination of the victim's mother, Michelle Thayer, defense counsel inquired into defendant's relationship with the victim. After eliciting testimony that defendant attended to, played with, held, changed, and fed the victim, defense counsel asked Thayer whether she would describe defendant as a "warm and loving father." Thayer answered, "Yes." On the third day of trial, the prosecution sought to recall Thayer in order to introduce evidence of defendant's prior child-cruelty conviction. The prosecution urged that the evidence was admissible pursuant to MRE 404(a)(1), which provides that the prosecution may offer character evidence against a defendant in order to rebut character

evidence offered by the defendant. Defendant objected to the introduction of the evidence on grounds (1) that the evidence was not properly admissible under MRE 404(a)(1), because defendant had not placed his character into evidence, (2) that the evidence was excludable under MRE 403, because its probative value was substantially outweighed by the danger of unfair prejudice, and (3) that evidence of the pervious child cruelty conviction would not rebut the character in question, because it was not a sex crime. The trial court ruled that the evidence was properly admissible under MRE 404(a)(1) to rebut the testimony elicited from Thayer on cross examination suggesting that defendant was a “good father,” and that it should not be excluded under MRE 403.

Defendant now challenges the trial court’s ruling on only two grounds. First, he contends that the evidence of his prior conviction was not properly admissible under MRE 404(a)(1), because he never put his own character into issue. We disagree. Defendant placed his character into evidence by eliciting testimony from Thayer on cross-examination that he was a “warm and loving father.” The jury could have inferred from this testimony that defendant could not have molested his son because a “warm and loving father” would not do such a thing. Accordingly, the prosecution was entitled to offer character evidence to the contrary. Cf. *People v Vasher*, 449 Mich 494, 502-503; 537 NW2d 168 (1995) (holding that the prosecution was entitled to offer character evidence to rebut a defendant’s testimony “that he had a close, grandfatherly, loving relationship with [the victims] and that this precluded him from ever harming them”).

Second, defendant contends that the evidence should have been excluded under MRE 403, because the probative value of the prior conviction was substantially outweighed by the danger of unfair prejudice. Again, we disagree. Probative value is the component of relevancy that goes to whether the evidence makes the existence of the fact to be proved more or less probable. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). Here, the fact at issue was whether defendant was a “warm and loving father.” Certainly, a prior conviction of child cruelty makes the existence of this fact less probable, as cruelty to a child is an act antithetical to “warm and loving” fathering. Defendant’s argument with respect to the “prejudice” component of MRE 403 is also unconvincing. The mere fact that the evidence was damaging to defendant’s case is immaterial. See *Vasher*, *supra* at 501 (“A party’s case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion.”). What matters is whether the evidence was *unfairly* prejudicial. In this regard, defendant merely states that the evidence suggested that he was a “bad father” and that was acting in conformity with that character trait. Although evidence of a person’s character is generally not admissible to prove action in conformity with that character trait on a particular occasion, the rule does not apply when the character evidence is offered to rebut character evidence offered by the accused. See MRE 403(a)(1). To the contrary, the purpose of the evidence was to prove that defendant was a “bad father” in order to rebut evidence that he was a “good father” acting in conformity with *that* trait. For these reasons, we cannot say that there was no justification or excuse for the trial court’s ruling. Therefore, we hold that the trial court did not abuse its discretion in admitting the challenged evidence. *Lugo*, *supra* at 709.

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to object to the prosecutor's attempts to elicit testimony from one expert witness (Clyde Owings) regarding the credibility of another expert witness (Vincent Palusci). We disagree. Defendant's argument is without merit first because the prosecutor did not directly ask Owings to offer an opinion as to Palusci's credibility. Instead, her question effectively asked Owings to offer an opinion as to the soundness of Palusci's conclusion. Moreover, defense counsel did object to the form of the prosecutor's question, arguing that she was "trying to impeach Dr. Palusci when he isn't even here to testify."

In his third issue on appeal, defendant argues that the prosecutor engaged in misconduct when she (1) introduced evidence of defendant's prior conviction of child cruelty, and (2) asked Owings to comment on Palusci's credibility. This argument too is without merit. The introduction of evidence of defendant's prior conviction of child cruelty can in no way be characterized as "prosecutorial misconduct" because it was done pursuant to a ruling of the court. Moreover, it was not unfairly prejudicial. Likewise, the prosecutor's examination of Owings did not constitute prosecutorial misconduct because—contrary to defendant's allegation—the prosecutor did not ask Owings to comment on Palusci's credibility.

Defendant also argues that he was denied a fair trial by the cumulative effect of the errors alleged. Because there was no error on any single issue, we are incapable of finding a "cumulative effect."

Next, defendant argues that his sentence was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. In this case, defendant's forty to sixty year sentence was within the term of imprisonment contemplated by the CSC I statute. See MCL 750.520b(2); MSA 28.788(2). Because he was sentenced as an habitual offender, the sentencing guidelines have no bearing on the issue whether the trial court abused its discretion. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Defendant had an extensive prior criminal record, including one prior conviction of child cruelty in 1986. In that case, defendant fractured the skull of another one of his infant sons. In his brief on appeal, defendant contends that his long sentence "renders no benefit to society." Given the atrocious circumstances of the instant offense and defendant's contemptible criminal record, we think differently. The trial court's sentence did not constitute an abuse of discretion.

Defendant also argues that his long prison sentence constituted "cruel and unusual punishment" in violation of the constitutions of Michigan and the United States. See US Const, Am VIII; Const 1963, art 1, § 16. We disagree. A proportionate prison sentence is not cruel and unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Finally, we note that the judgment of sentence incorrectly indicates that defendant was sentenced as a second habitual offender when, in fact, he was sentenced as a third habitual offender. Accordingly, we remand for the sole purpose of allowing for the correction of the clerical error in the judgment of sentence.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr

/s/ William B. Murphy

/s/ Michael J. Talbot